Filed 3/21/11 In re Tran CA4/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| In re SINH VINH TRAN<br><br>on Habeas Corpus. | G043418<br><br>(Super. Ct. Nos. 95WF0488 & M-12959)<br><br>O P I N I O N |

Original proceeding; petition for a writ of habeas corpus. Petition granted.

Sinh Vinh Tran, in pro. per.; and Stephen M. Defilippis under appointment by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr. and Kamala D. Harris, Attorneys General, Julie L. Garland, Assistant Attorney General, Anya M. Binsacca, Amber N. Wipfler and Gregory L. Marcot, Deputy Attorneys General, for Respondent.

* * *

In 1995, petitioner Sinh Vinh Tran, then serving a prison sentence for armed robbery and other theft-related crimes, pleaded guilty to second degree murder that arose from a 1992 gang-related shooting. At his third parole consideration hearing, held April 6, 2009, a Board of Parole Hearings (the Board) panel found petitioner suitable for release on parole. The Governor reversed the Board's decision citing what he described as "[t]he gravity of the crime," petitioner's minimization of his criminal activity and failure to accept full responsibility for it, his minimal participation in therapy programs, plus his elevated risk assessment.

Petitioner unsuccessfully challenged the Governor's ruling in the superior court. He then filed the current petition with this court, seeking the same relief. We issued an order to show cause to review the Governor's ruling. The Governor filed a return to the order to show cause. We now conclude the Governor's decision is not supported by the evidence because it is based on isolated bits of the record taken out of context. Thus, we shall vacate the Governor's decision and order reinstatement of the Board's April 2009 parole suitability finding.

## FACTS AND PROCEDURAL BACKGROUND

In 1992, petitioner, then 18 years old, belonged to the Tiny Rascals criminal street gang. After learning fellow gang members had been involved in an altercation with members of a rival gang named Cheap Boys at a local shopping mall, petitioner obtained what he described as a "gang gun" and went to the mall with Tiny Rascals members. Upon seeing a group of Cheap Boys leaving the mall, petitioner stuck his head out of the car and asked the group "where were they from." When they said Cheap Boys, he displayed the gun. The group began running and petitioner fired the gun several times. Binh Nguyen, one member of the group, was struck by a bullet in the back of the head and killed.

The police did not initially arrest petitioner for Nguyen's murder. But shortly after the shooting, petitioner was convicted of several theft-related crimes and received a 7-year prison sentence. During his initial incarceration he committed two CDC 115 and three CDC 128 prison rule violations. However, he also disassociated from gang activity.

In 1995, petitioner was returned to Orange County and charged with Nguyen's murder. He entered a guilty plea to second degree murder and received a 15-years-to-life sentence. At his sentencing the court allowed petitioner to address Nguyen's family and he apologized to them for the killing.

Upon his return to prison, petitioner remained discipline-free. He obtained his General Equivalency Diploma (GED) and an Associates of Arts degree from a local community college. Petitioner completed vocational programs in landscaping and offset printing technology, plus training in small engine repair, office services, cabinetry, and vocational arts. He participated in Alcoholics Anonymous and completed three anger management programs, a crime victim impact program, and several religious programs.

During his incarceration petitioner received psychological evaluations in December 2003 and August 2007. The 2003 report diagnosed petitioner with "Adult Antisocial Behavior (by history only)" with "[n]o contributing personality disorder." It stated petitioner "show[ed] some understanding of the causative factors leading to [his commitment] offense" plus "some empathy towards the damage done to the victim." The evaluation assessed petitioner's violence potential as "low" "in a controlled setting," but "average to slightly above average relative to the average citizen in the community."

The 2007 evaluation updated the 2003 report. It also addressed four issues the Board submitted after petitioner's 2004 hearing: Petitioner's "violence potential in the free community," "[t]he significance of alcohol/drugs as it relates to the commitment offense," "[t]he extent to which [petitioner] has explored the commitment offense and [has] come to terms with the underlying causes," and petitioner's "need for further

therapy programs while incarcerated." The 2007 report assessed petitioner's propensity for violence, plus his level of psychopathy and recidivism "in the low range." (Bold, underscoring, and italics omitted.) It further concluded "neither alcohol nor drugs were a major factor in his life or in the commit[ment] offense." As for his exploration of the commitment offense and its causes, the report concluded petitioner had "spent a considerable amount of time looking at the causal factors behind the [commitment] offense," could "identify a number of factors that influenced his original acting out behaviors and criminal problems," and had "accepted responsibility for his behavior and expresse[d] an appropriate level of remorse." Finally, the report concluded petitioner was not "a candidate for noteworthy change as a result of psychotherapy . . . ."

Petitioner documented parole plans, explaining he would live either with his parents or an aunt and attend school. In addition, his sister offered to provide him with financial assistance and he had been offered a fulltime job by a Vietnamese minister.

At the April 2009 parole consideration hearing, petitioner gave the following description of the shooting. Upon arriving at the mall the two groups "saw each other" and "recognized each other. Their facial expressions changed . . . . And as . . . they walked towards me . . ., I stuck my head out the window and I confronted them. . . . A[fter] they replied . . ., that's when I pulled out the gun and I pointed [it] at them. When they . . . [saw] the gun, they started running. And then I made the stupidest decision of my life, I pulled the trigger."

In response to questioning by a deputy district attorney, petitioner stated he "had surrounded [himself] with . . . negative influences" that "affected [his] attitudes" and allowed his pride to control his actions. Asked "what caused [him] to begin shooting," petitioner said, "when the other group advanced towards me and my group, . . . I started to become anxious and fearful. And when the other group came too close . . ., that's when I stuck my head out the window and confronted them . . . ." But he further explained, "I said in the past that when I pulled out that gun I did it in fear

because of a confrontation. Yet, you know, when I think about it and come down to the heart of it, it wasn't my fear that made me pull that trigger, I believe it was my pride. My pride was that voice that told me you can't back down, you have to maintain face. . . . [P]ride results when you overvalue yourself at the expense of others" and "undervalue other people. And I believe pride played a role in interfering with my ability to reason . . . as well [as] . . . my sense of right and wrong back then."

At the completion of the hearing, the Board acknowledged the existence of several negative factors, including petitioner's "prior criminality," "unstable social history," and a commitment offense that "was atrocious and cruel" and "carried out" with "exceptionally callous disregard for human suffering" for a "very trivial" motive. Nonetheless, citing petitioner's "genuine remorse," "apolog[y] to the [victim's] family," acknowledgement "that [he]. . . shot the victim" and "caused [the victim's] death," positive "institutional behavior," participation in educational, vocational, and self-help programs, psychological evaluations "indicat[ing] a low prediction of future violence," and realistic parole plans, the panel found him suitable for parole. The Governor subsequently reversed the Board's parole suitability ruling.

## DISCUSSION

### *1. Introduction*

In reversing the Board, the Governor summarized his decision as follows: "The gravity of the crime supports my decision, but I am particularly concerned by the evidence that [petitioner] still minimizes his prior criminal conduct and has not accepted full responsibility for his offense, by his minimal efforts to seek self-help and therapy courses, and by his multiple recent elevated risk assessments. This evidence indicates that [petitioner] still poses a risk of recidivism and violence and that his release from prison at this time would pose an unreasonable risk to public safety."

Petitioner contends the Governor's findings are not probative of his current dangerousness because he "reli[ed] on the immutable facts of [the] commitment offense, "'recharacterizations' of [his] statements in the record," failed to acknowledge petitioner "availed himself of every rehabilitative resource available to him," and "mine[d ]out a single risk assessment measure . . . from the . . . [p]sychological [e]valuation[s that was] based on immutable ' . . . historical factors' . . . ." The Attorney General disagrees, arguing petitioner "commit[ted] an 'especially heinous' crime," "consistently minimized his culpability[,] and demonstrated insufficient insight into his commitment offense."

*2. Statutory Background*

Penal Code section 3041, subdivision (b) declares the parole board "shall set a release date unless it determines that the gravity of the current convicted offense . . . or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed . . . ." The governing regulations provide, "a life prisoner shall be found unsuitable for and denied parole if in the judgment of the [Board] the prisoner will pose an unreasonable risk of danger to society if released from prison." (Cal. Code Regs., tit. 15, § 2402, subd. (a).) In making this determination, the Board shall consider "[a]ll relevant, reliable information available" (Cal. Code Regs., tit. 15, § 2402, subd. (b)), and lists several factors related to both suitability and unsuitability for parole. (Cal. Code Regs., tit. 15, § 2402, subds. (c) & (d).) "In sum, the Penal Code and corresponding regulations establish that the fundamental consideration in parole decisions is public safety," and "the core determination of 'public safety' under the statute and corresponding regulations involves an assessment of an inmate's *current* dangerousness." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1205.)

The Governor may conduct a de novo review of the Board's decision and modify or reverse it based on materials provided by the Board. (Cal. Const., art. V, § 8, subd. (b); Pen. Code, § 3041.2, subd. (b).) In reviewing a board's parole suitability decision "the Governor . . . sits as the trier of fact and may draw reasonable inferences from the evidence. [Citation.]" (*In re Smith* (2009) 171 Cal.App.4th 1631, 1639.)

"Although 'the Governor's decision must be based upon the same factors that restrict the Board in rendering its parole decision' [citation], [since] the Governor undertakes an independent, de novo review of the inmate's suitability for parole," he or she "has discretion to be 'more stringent or cautious' in determining whether a defendant poses an unreasonable risk to public safety. [Citation.] '[T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor . . . .'" (*In re Lawrence, supra,* 44 Cal.4th at p. 1204.)

*3. Judicial Review of a Parole Suitability Decision*

To "'ensure compliance'" with due process of law, courts are "authorized to review the merits of the Board's or the Governor's decision to grant or deny parole." (*In re Prather* (2010) 50 Cal.4th 238, 251.) The standard of judicial review of the Board's or Governor's decision is "whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." (*In re Lawrence, supra,* 44 Cal.4th at p. 1191.) This standard is a deferential one. "Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor." (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 677.) Thus, even though "the Governor simply review[s] the documents before the Board, he [is] free to make his own credibility determinations," and if the Governor chooses "to disbelieve petitioner, we [are] bound by that determination. [Citation.]" (*In re Tripp* (2007) 150 Cal.App.4th 306, 318.)

"As with the discretion exercised by the Board in making its decision, the precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor, but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the Governor's decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision." (*In re Rosenkrantz, supra*, 29 Cal.4th at p. 677.)

But "[t]he 'some evidence' test which we apply in basing our decision 'must have some rational basis in fact.' [Citation.]" (*In re Gomez* (2010) 190 Cal.App.4th 1291, 1306.) Consequently, "[t]aking all the above into consideration, our job requires us to independently review the record to determine whether there is 'some evidence' to support the Governor's decision to reverse petitioner's grant of parole. [Citation.] We independently review the record to determine whether those factors relied upon by the Governor in his decision to reverse the Board's grant of parole, establish that petitioner is currently dangerous when viewed in light of the full record before us. [Citation.]" (*Ibid.*)

*4. Analysis*

The Board, Governor, and Attorney General all noted the egregious nature of petitioner's commitment offense. In retaliation for a prior altercation with rival gang members, petitioner acquired a gang gun, accompanied his fellow gang members in a return to the site of that altercation and, upon confronting the rival group, displayed the weapon. When the group fled, petitioner fired it several times, striking and killing one of

them. But the Supreme Court has noted "although the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or postincarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative of the statutory determination of a continuing threat to public safety." (*In re Lawrence, supra,* 44 Cal.4th at p. 1214.)

While petitioner had a record of prior criminal activity that lead to his incarceration before he was charged with and convicted of Nguyen's murder, the Governor did not rely on his pre-incarceration history in reversing the Board's ruling. (*In re Vasquez* (2009) 170 Cal.App.4th 370, 385 [courts confine review to only the factors cited by the Board or Governor for granting or denying a parole ruling]; *In re Roderick* (2007) 154 Cal.App.4th 242, 265 [same].) Thus, the focus in this case is on petitioner's post-incarceration record.

At the time of his April 2009 parole consideration hearing, it had been nearly 17 years since petitioner committed the commitment offense. During that time, he disassociated himself from gang activity, had remained discipline-free from the time he returned to prison after pleading guilty to Nguyen's murder, and took steps to academically, emotionally, and morally improve himself.

Citing statements by petitioner at the April 2009 parole consideration hearing where he said he went to the mall to back up his fellow gang members, "did not have the intention to commit murder," and "bec[a]me anxious and fearful" when the rival gang members approached the car, the Governor found petitioner "still minimizes his prior criminal conduct and has not accepted full responsibility for his offense . . . ."

We conclude the Governor has taken petitioner's statements out of context. An inmate's lack of insight into, or minimizing of responsibility for, previous criminality, despite professing some responsibility, is a relevant consideration. [Citation.]" (*In re Lazor* (2009) 172 Cal.App.4th 1185, 1202, fn. omitted.) But "expressions of insight and remorse will vary from prisoner to prisoner and . . . there is no special formula for a prisoner to articulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior." (*In re Shaputis* (2008) 44 Cal.4th 1241, 1260, fn. 18; *In re Twinn* (2010) 190 Cal.App.4th 447, 465.)

Petitioner pleaded guilty to second degree murder for killing Nguyen and personally apologized to the victim's family at his sentencing hearing. He never claimed that he fired the gun in self-defense. At the parole consideration hearing, he also "accept[ed] the consequences of what I've done." An acknowledgement that he wanted to back-up his fellow gang members and his admission of being "anxious and fearful" when the confrontation with the rival gang members occurred do not lead to a conclusion petitioner lacked an intent to inflict harm when he accompanied his fellow gang members to the mall armed with a gun. The specific point when petitioner formed the intent to kill is not crucial here because he admitted at the parole consideration hearing that committing murder is "what I ended up doing," and he "made the . . . decision" to "pull[] the trigger" after the rival gang members "started running." "[A]n inmate need not agree or adopt the official version of a crime in order to demonstrate insight and remorse. [Citation.]" (*In re Twinn, supra,* 190 Cal.App.4th at p. 466; see also *In re Palermo* (2009) 171 Cal.App.4th 1096, 1110-1112, disapproved on another point in *In re Prather, supra,* at pp. 252-253.)

For these reasons, this case is distinguishable from *In re Taplett* (2010) 188 Cal.App.4th 440 and *In re Loveless* (2011) 192 Cal.App.4th 351 where the appellate courts affirmed gubernatorial reversals of parole suitability findings based on an inmate's lack of insight. Viewing petitioner's statements as a whole and in context, we conclude

the record fails to support the Governor's finding he continued to minimize his criminal activity and failed to assume responsibility for the harm he inflicted.

The Governor also claims petitioner exerted only "minimal efforts [in] seek[ing] self-help and therapy . . . ." In support of this finding, the Attorney General claims petitioner only "attended Alcoholics Anonymous and completed three anger management classes," but "did not participate in any programs tailored toward avoiding gang activity or overcoming peer pressure." These assertions fail to acknowledge the full state of petitioner's efforts while in prison. Academically, he obtained his GED and an Associate of Arts degree. Vocationally, petitioner acquired two certificates and obtained training in three other areas. In addition to 10 years of attending Alcoholics Anonymous meetings and completing three anger management classes, petitioner participated in programs conducted by religious groups covering Christian discipleship and personal evangelism. As for the lack of any course dealing with gangs, petitioner disassociated himself from gang life when he first entered prison in 1992 and had no further involvement with gangs thereafter. Nothing in the record suggests self-help courses about gangs either existed or were called for in this case.

Finally, the Governor cited what he described as "recent elevated risk assessments" to support his reversal of the Board's parole suitability finding. In this proceeding, the Attorney General makes no attempt to support the Governor's decision on the basis of this finding.

Nor does the record support the assertion of an elevated risk potential. The psychological evaluations diagnosed petitioner with adult antisocial behavior, but these diagnoses were based solely on the historical record of his criminal activity. Petitioner's 2003 psychological evaluation contains the statement, "[i]f released to the community, clinically assessed, [petitioner's] violence potential is considered to range from the average to slightly above average relative to the average citizen in the community."

But in 2007, the psychologist who prepared the report noted the following results in responding to the Board's inquiry about petitioner's violence potential if released to the community. As for petitioner's "level of psychopathy, a trait that has been linked to episodes of repetitive aggression and criminality," he was "scored in the low range . . . ." (Bold omitted.) The psychologist also assessed petitioner as being in the low range for both his "overall propensity for violence" and "general recidivism." Consequently, the Governor's reliance on a purported elevated risk assessment also lacks evidentiary support.

The Attorney General notes the Governor also mentioned the Orange County District Attorney's opposition to petitioner's grant of parole. Contrary to the Attorney General's argument, the Governor merely acknowledged the district attorney's opposition, but did not rely on it as a basis for his reversal of the Board's ruling. Furthermore, "[t]he District Attorney's 'opinion[,]' like the Governor's belief, is not *evidence,* and therefore does not constitute 'some evidence' supporting the Governor's decision." (*In re Dannenberg* (2009) 173 Cal.App.4th 237, 256, fn. 5; see also *In re Weider* (2006) 145 Cal.App.4th 570, 590 [district attorney's opposition to parole grant may give "weight . . . to evidence of unsuitability," it "cannot add weight where there is no evidence of unsuitability to place in the balance"].)

We conclude the Governor's decision to reverse the Board's parole suitability finding as to petitioner is not supported by any evidence in the record.

*5. Remedy*

The Attorney General contends that if we find the Governor's decision is unsupported, "the proper remedy is to remand the matter to the Governor with instructions to conduct a new parole consideration hearing in accordance with due process." But we have previously recognized "'[t]he proper remedy is to vacate the Governor's decision and to reinstate that of the Board. [Citation.]' [Citations.]" (*In re*

*Gomez, supra,* 190 Cal.App.4th at p. 1309.) This conclusion is supported by the constitutional and statutory foundations of the Governor's parole review authority as well as Supreme Court precedent. Section 8, subdivision (b) of Article V of the California Constitution provides "[t]he Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider." In addition, under Penal Code section 3041.2, subdivision (a) "the Governor, when reviewing" a Board "decision . . . shall review materials provided by the parole authority." Consequently, we reject the Attorney General's remand for further review proposal.

DISPOSITION

The petition for a writ of habeas corpus is granted. The Board's grant of parole is hereby reinstated.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.